89-729

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOM ABBOTT, *et al.*,
Petitioners,

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid time and a half. Under that section, a public employer may provide compensatory time in lieu of overtime pay pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The question presented here is whether a public employer who refused to recognize and to attempt to work out a compensatory time agreement with a representative designated by its employees may nonetheless unilaterally implement and follow a compensatory time program?

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119. James L. Wood
120. Grant L. Wylie
121. Paul C. Yokum
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123. The Virginia Beach Police Sergeants' Association

II.

DEFENDANT/APPELLEE/RESPONDENT

The City of Virginia Beach, Virginia

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OCTOBER TERM, 1989

No. _____

TOM ABBOTT, *et al.*,
Petitioners,

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Tom Abbott, *et al.*, the plaintiffs in the District Court and the appellants in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Tom Abbott, et al. v. The City of Virginia Beach*, 4th Cir., No. 88-2958 (July 19, 1989).

OPINIONS BELOW

The Court of Appeals opinion is reported at 879 F.2d 132 (4th Cir. 1989) and is reproduced as Appendix A (pp. 1a-10a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's order denying plaintiffs' motion for summary judgment is reported at 689 F. Supp. 600 (E.D. Va. 1988) and is reproduced as Appendix B (Pet. App. 11a-19a). The District Court's final order is un-

published and is reproduced as Appendix C (Pet. App. 20a-40a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on July 19, 1989. By an order dated October 12, 1989, the Chief Justice extended the time for filing this *certiorari* petition to and including November 6, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 207(o)(1)-(2) of the Fair Labor Standards Act, 29 U.S.C. §§ 207(o)(1)-(2), is reproduced as Appendix D (Pet. App. 41a-43a).

The Secretary of Labor's regulations set out at 29 C.F.R. § 553.23, are reproduced as Appendix E (Pet. App. 43a-45a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act, as amended, provides that employers must pay their employees one and a half times the employee's normal pay for overtime. *See* FLSA § 7, 29 U.S.C. § 207. Section 207(o) permits *public employers*, under certain stated circumstances, to substitute "compensatory time"—*viz.*, paid time off—for the added overtime pay otherwise required by the Act. In the regard most pertinent here, § 207(o)(2)(A)(i) states that compensatory time may be provided pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ."

The regulations adopted by the Secretary of Labor to implement FLSA § 207(o) provide, in turn, that "the representative need not be a formal or recognized bar-

gaining agent as long as the representative is designated by the employees." Pet. App. 44a. And the regulations add ". . . *Where employees have a representative*, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency." Pet. App. 44a (emphasis added).

2. The 121 police officers employed by the City of Virginia Beach, Virginia, who are the petitioners here, designated the Virginia Beach Police Benevolent Association (VBPBA) and/or the Virginia Beach Police Sergeants' Association (VBPSA) and/or Tom Abbott, Frank LaPorta, and Nick Sitarski as their representatives for the purposes of working out an FLSA § 207(o) compensatory time agreement with their employer.

Virginia Beach, however, unilaterally instituted—and has maintained and modified—an overtime policy for police officers providing for compensatory time in lieu of overtime pay even though no agreement had been reached with the police officers' duly designated representatives.

Petitioners repeatedly objected to Virginia Beach's unilateral compensatory time policy, and ultimately brought this suit in the Federal District Court for the Eastern District of Virginia challenging the legality of that policy under the FLSA after the City consistently refused to meet with their representatives.

The court below upheld the Virginia Beach program on the grounds that (1) Virginia state law prohibits public employee collective bargaining; and (2) the officers involved had an "absolute choice" as to whether to receive compensatory time or time and a half for overtime. Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

A Clear Conflict Exists Among the Courts of Appeals As To The Application of the Fair Labor Standards Act's Overtime Provisions to Public Employers and Public Employees

1. Congress' assertion of a Commerce Clause power to set basic labor standards—such as those set out in the Fair Labor Standards Act, as amended—in the state and local government sector as well as in the private sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of the state and local governments and the special character of the public employer-public employee relationship.

In a direct response to these concerns, the 1985 Congress amended the Fair Labor Standards Act insofar as that Act applies to the public sector. P.L. 99-150; 99 Stat. 790. And Congress acted only after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs. Indeed, Congress went so far as to mandate the issuance of regulations necessary to implement the 1985 FLSA amendments. P.L. 99-150, § 6. The Department of Labor, in turn, conducted an extensive rulemaking proceeding and solicited and carefully considered the views of the state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987).

After the *Garcia* decision, many public employers and their organizations sought congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In

hearings held by House and Senate committees, public employees and their representatives made the contrary arguments that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same labor standards as virtually all private employees.

To avoid a legislative deadlock, the public-employer and public-employee groups met and proposed a bill which was the product of intense negotiations between all the affected parties and of extensive compromise. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police," 113 Cong. Rec. S14047 (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). And, with such broad support, the 1985 FLSA Amendments were quickly passed by Congress.

Nonetheless, a deep disagreement has developed as to a critical aspect of the compromise forged in the 1985 FLSA amendments and elaborated in the regulations on those amendments: the scope of the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement on compensatory time with the representative designated by their employees. This disagreement concerns the interplay between the federal law setting the conditions for the provision of compensatory time and the state law setting the conditions on which public employers may enter into agreements with their employees. And the resulting litigation has led to a three-way split in the circuits.

Given the importance and sensitivity of the underlying issue—and the serious effort Congress and the Department of Labor made to resolve that issue in a balanced fashion—this Court should settle that conflict.

2. FLSA § 207(o), as we have noted, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid time and a half. Under that section, a public employer may provide compensatory time in lieu of overtime pay pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

Section 207(o) goes on to specify that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o).]

In the 4 years since § 207(o) became law, three courts of appeals have had occasion to interpret the provision; each court has come to a different interpretation. Put simply, there is a clear and patent conflict in the circuits with the result that the rights and duties of public employees and public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs.

A. The first court of appeals decision on FLSA § 207(o) was *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). In the *West Adams* case, a local government body in Colorado—asserting the right under Colorado law of a local government employer to refuse to recognize and to bargain collectively with labor organizations—had refused to enter into an FLSA § 207(o)(2)(A)(i) compensatory time agreement with the representative that had been designated by its employees pursuant to that provision.[1] Relying on § 207(a)(2)(A)(*ii*), the West Adams Fire District argued that, given this state law right, the District was free to take the position that its employees did not—indeed as a matter of state law could not—have a representative and to follow its past practices regarding compensatory time.

The Tenth Circuit rejected that argument concluding that, under the FLSA, once employees designate a representative for purposes of reaching a § 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. Section 207(o)(2)(A)(*ii*)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated a representative.

In reaching its conclusion, the Tenth Circuit principally relied on the Department of Labor's regulations on § 207(o)—promulgated, as we have noted, pursuant to an explicit statutory command—which state in pertinent part:

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[1] Under Colorado law, governmental entities have a right to refuse to recognize labor organizations and to refuse to engage in collective bargaining or enter into any agreements whatsoever with such organizations. *See City and County of Denver v. Denver Fire Fighters*, 663 P.2d 1032, 1036-1039 (Colo. 1983); *Littleton Education Asso. v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (quoted 877 F.2d at 817).]

The Tenth Circuit recognized that the foregoing makes two points irrefutable:

> *First*, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. *Second*, employees are deemd to be represented under section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818 (emphasis added).]

In determining whether to follow this administrative construction, the Tenth Circuit undertook two inquiries: (1) is the statutory language ambiguous; and (2) is the administrative construction a reasonable resolution of the ambiguity, in light of the statute's language and history. That court answered both inquiries "yes."[2]

As to the second inquiry, the Tenth Circuit—following this Court's instructions in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)—stated that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817. And, that court

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[2] As to the first issue, whether the statute is ambiguous, the court stated as follows: "We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to 'employees not covered by subclause (i).' However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative." 877 F.2d at 817; *see also id.* at n.1.

rested its conclusion that the Labor Department's construction of FLSA § 207(o) is reasonable on the relevant legislative history.

In this regard, the Tenth Circuit noted that the legislative materials clearly establish that § 207(o)(2)(A)(ii) only applies where the employees have *no* representative. *See* 877 F.2d at 819 (quoting S.Rep. No. 99-159, 99th Cong. 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong. 1st Sess. 20 (1985)). And that court found that—although there were "variations in the reports of the two houses of Congress" on the issue of when employees have a representative, 877 F.2d at 820—the Labor Department's interpretation is derived from the House Report. "[B]ecause of the support of the House report," the Tenth Circuit held that the Labor Department "reasonably determined that employees are represented if they have merely designated a representative whom the employer has failed to recognized." [3]

B. The Fourth Circuit decision in the instant case—which issued shortly after the Tenth Circuit's *West Adams* decision—cannot be reconciled with that of the Tenth Circuit.

Like the Tenth Circuit, the court below concluded that the statutory language is ambiguous on the issue of when employees have a "representative" for purposes of § 207(o)(2)(A)(i)—and hence on when an employer who desires to provide compensatory time may only do so pursuant to an agreement with such a representa-

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[3] We hasten to add that nothing in the Tenth Circuit's analysis requires a public employer to recognize—or to reach any agreement with—any employee representative or with any individual employee if doing so is contrary to state law or state policy. All that the Tenth Circuit held—and all that petitioners argue here—is that in such circumstance the public employer, having for its own sufficient reason chosen not to take advantage of the option provided by Congress, is required to pay time and a half for overtime (just as a private employer covered by the FLSA is required to do).

tive—and that the "legislative history is contradictory on the issue." Pet. App. 6a. But the Fourth Circuit, unlike the Tenth, concluded that "the administrative commentary is confusing" as well. *Id.*

Against that background, the Fourth Circuit focused on two factors in construing § 207(o), neither of which is adverted to in the statute or in the Labor Department's regulations: first, that Virginia state law does not permit public employee collective bargaining, and, second, that the public employer here had allowed each employee required to overtime an absolute choice between overtime pay and compensatory time (albeit without reaching a § 207(o)(2)(A)(i) agreement with the representative the affected employees had designated pursuant to that provision).

Regarding the relevance of the state-law status of collective bargaining, the Fourth Circuit quoted language in the preamble of the Labor Department's regulations stating:

> The Department recognized that there is a wide variety of State law that may be pertinent . . . . It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. [Pet. App. 8a quoting 52 Fed. Reg. 2012, 2014-15 (1987).]

On the basis of the foregoing, the court below concluded that § 207(o)(2)(A)(i) does not apply where state law prohibits collective bargaining, since otherwise the statute would "preempt," rather than incorporate state law. *See* Pet. App. 8a.[4]

The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that Virginia law

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[4] As we develop at pp. 13-15, *infra*, the Fourth Circuit did not cite or discuss other portions of the preamble or the portions of the regulations itself which belie that court's reading of the regulation.

prohibits public employment collective bargaining agreements while Colorado law allows local governments to choose whether to engage in or to refuse to engage in collective bargaining. Pet. App. 9a n.4. The court below did not explain, however, why a state decision to prohibit collective bargaining should operate to alter the scope of § 207(o)(2)(A)(i), while a state decision to delegate that decision to a local government, which in turn determines to deny its employees collective bargaining rights, should not.

Regarding the fact that Virginia Beach offered individual employees a choice of overtime pay or compensatory time, the Fourth Circuit stated that respondent had conformed to the underlying policies of FLSA § 207(o) which "provide flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory overtime hours worked by covered employees." 879 F.2d at 136-137 (quoting H.R. Rep. No. 99-331, *supra*). However, that court did not explain how this factor fits into § 207(o)'s language or structure.

C. The Eleventh Circuit's decision in *Dillard v. Harris*, 885 F.2d 1549 (forthcoming); slip op. No. 88-8245 (11th Cir. September 29, 1989), *petition for rehearing pending*, is the most recent to deal with FLSA § 207(o). The *Dillard* case involved Georgia state employees who had designated a labor organization as their § 207(o) representative and a state employer who had refused to recognize the designation and had, instead, continued a unilateral past practice of providing compensatory time in lieu of overtime pay. The Eleventh Circuit held that § 207(o)(2)(A)(*ii*)—rather than § 207(o)(2)(A)(*i*)—governed and that Georgia was free to provide compensatory time pursuant to its past practice.

Th Eleventh Circuit noted that Georgia, like Virginia, does not provide for public employee collective bargain-

ing, and, on that basis, stated that it would follow the Fourth Circuit's decision in the instant case. In so doing, the Eleventh Circuit readily acknowledged that there is a conflict between the Fourth and Tenth Circuits, and that in following the Fourth, the Eleventh was "refus[ing] to follow the Tenth Circuit [in *West Adams*] which reached a different result." 885 F.2d at ——; slip op. at 3.

The Eleventh Circuit, moreover, stated that "[b]ecause this issue is surfacing in various courts which are reaching divergent results, . . . a discussion of an alternative approach that reaches the same result may be appropriate." 885 F.2d at ——; slip op. at 3. That court then justified its decision on an alternative basis which, in its view, is "[e]qually satisfactory" to the approach of the Fourth Circuit, *id* at ——; slip op. at 3, and which is at least equally in conflict with the approach of the Tenth Circuit. Indeed, the Eleventh Circuit's elaboration of its alternative basis of decision largely amounts to a point-by-point disagreement with the Tenth Circuit's *West Adams* decision.

The Eleventh Circuit reasoned that—despite the contrary view of the Tenth Circuit (and, as we read the opinion below in the instant case, of the Fourth Circuit) —the relevant statutory language is clear and unambiguous. On the Eleventh Circuit's reading, § 207(o)(2)(A)(*i*) applies only where an agreement exists between an employer and a representative; all other situations are governed by § 207(o)(2)(A)(*ii*), whether or not the employees have designated a representative. 885 F.2d at ——; slip op. at 9-11. Although, as the Tenth Circuit recognized, this construction of § 207(o) is in conflict with *both* the House and Senate reports, *see West Adams*, *supra*, 877 F.2d at 819 (quoting House and Senate reports), the Eleventh Circuit held that the legislative history contains only "unclear and conflicting statements"

on the issue. 885 F.2d at ——; slip op. at 13.[5] Moreover, the *Dillard* opinion *wholly ignored* the Labor Department's regulations which state the position followed by the Tenth Circuit and opposite to the position of the Eleventh Circuit. *See* 29 C.F.R. § 553.23(b)(i) ("Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency.") (*quoting in West Adams, supra*, 877 F.2d at 817). Finally the Eleventh Circuit expressly refused to adopt the Fourth Circuit's position that the fact that a public employer provides an "absolute choice" between overtime pay and compensatory time is relevant in determining the scope of § 207(o)(2)(A)(i). Thus, the *Dillard* decision states yet a third construction of § 207(o), and this construction is in conflict with both the prior § 207(o) decisions.

As the foregoing makes clear, the decisions of the Tenth, Fourth and Eleventh circuits on the meaning of § 207(o) leave the law in total disarray. Review by this Court is urgently required.

3. The Fourth Circuit's decision below is not only in conflict with both the Tenth and Eleventh Circuit decisions regarding the meaning of § 207(o), as we will now show, it is also incorrect. While paying lip service to principles of deference to agency resolution of open statutory questions, the Fourth Circuit's view of the statute conflicts with the reasonable view adopted by the Labor Department in its regulations.

A. According to the Fourth Circuit, § 207(o)(2)(a)(i) only applies "where state law permits employees of state and local governmental entities to have recognized

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[5] In surveying the legislative history on this point, the *Dillard* opinion failed to mention the language from the House and Senate reports that the Tenth Circuit had relied on much less do business with that language. *Compare West Adams, supra*, 877 F.2d at 819 with *Dillard, supra*, 885 F.2d at ——; slip op. at 11-15.

representatives" for purposes of collective bargaining. Pet. App. 8a. Thus, because Virginia law does not permit enforceable collective bargaining agreements, Pet. App. 4a (*citing Commonwealth v. County Bd. of Arlington County*, 217 Va. 558, 232 S.E. 2d 30 (1977)), the court below held that Virginia Beach could provide compensatory time in lieu of overtime without reaching a § 207(o)(2)(A)(i) agreement with the representative designated by its employees pursuant to that provision.

Although purporting to defer to the Department of Labor in reaching this conclusion—*see* Pet. App. 8a (quoting the regulation's preamble statement that "the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with state or local law and practices")—the Fourth Circuit entirely ignored that the Labor Department had made entirely clear in the *same preamble* that "[t]he representative of the employees *need not be a formal or recognized collective bargaining agent. . . . [C]ollective bargaining is not a necessary condition* for establishing an agreement between an employer and an employee representative," Pet. App. 48a; emphasis added.

Moreover—and again the Fourth Circuit simply ignored the relevant statutory and regulatory materials—the statute's language makes clear that less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes. The provision may be complied with through "memorandum[s] of understanding or any other agreement." And, in explicit recognition of this, the Labor Department regulations state that

> [T]he agreement or understanding . . . [may be] through a memorandum of understanding or other type of oral or written agreement . . . [and] the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [Pet. App. 44a.]

Given what the Labor Department's regulations say when read in full, the Fourth Circuit's insistence that § 207(o)(2)(A)(i) has no application where the state does not permit collective bargaining is simply incorrect.

B. The Fourth Circuit's insistence that § 207(o)(2)(A)(i) has no application here because Virginia Beach provided each employee with an absolute choice between overtime pay and compensatory time is even further from the statutory scheme. The court below gave no citation of statutory or administrative authority for the proposition that this factor is even relevant much less dispositive. Again, the court below was simply in error.

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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